Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange	)	
Carriers	)	

Joint Comments of
American Discount Telecom, Inc.
Bullseye Telecom, Inc.
Call America
Creative Interconnect, Inc.
Express Phone Service, Inc.
United Communications, Inc. d/b/a UNICOM
The Utilities Commission of New Smyrna Beach
And
Westel, Inc.

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American Discount Telecom, Inc., Bullseye Telecom, Inc., Call America, Creative Interconnect, Inc., Express Phone Service, Inc., United Communications, Inc. d/b/a UNICOM, the Utilities Commission of New Smyrna Beach, and Westel, Inc. (the "SAFE-T Joint Commenters"), by their attorneys, respectfully submit these Joint Comments on the Commission's *Order and Notice of Proposed Rulemaking* in the above-captioned proceeding.[1] The Joint Commenters consist of small integrated service providers and regional CLECs. All are members of the Save American Free Enterprise in Telecommunications Coalition ("SAFE-T"), which has been created to represent the interests of competitive local exchange carriers ("CLECs") in regulatory proceedings where the continued availability of basic rights of competitors under the Telecommunications Act of 1996 (47 U.S.C. §§ 151 *et seq*.) is threatened.

[1] FCC 04-179, rel. Aug.20, 2004 (the "*NPRM*" or "*Order and NPRM*").

Although the *NPRM* is extremely broad in the issues posed and their impacts on the future of local exchange competition in the mass market, these Comments address a discrete number of questions posed in the *NPRM* that are of most immediate and critical concern to small CLECs. We reserve the right to address additional issues in reply comments.

I. Summary

Notwithstanding The *USTA II* decision,[2] the Telecommunications Act of 1996 explicitly commands that ILECs provide access to unbundled network elements, "in a manner that allows requesting carriers to combine such elements," whenever "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[3] Although the D.C. Circuit's latest *USTA* decision has obliterated beyond recognition the plain meaning of the word "impair" in violation of the Supreme Court's admonition to adhere to the "ordinary and fair meaning" of that term,[4] the court did not strike down the impairment standard adopted by the Commission in the *Triennial Review Order.*[5] Nevertheless, the court again vacated key elements of the Commission's Section 251 unbundling rules, and the *NPRM* commendably seeks to avert or ameliorate the displacement of millions of customers and hundreds of providers of newly competitive local exchange services.

Other parties will discuss how the Commission should apply the "impairment" standard going forward. These Commenters simply note that elimination of the Commission's Section 251(c)(3) UNE rules is not commanded by the *USTA II* decision; nor, more importantly, is it warranted under the Act. Unless the Commission in this proceeding adopts substitute rules

[2] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*")
[3] 47 U.S.C. §§ 251(c)(3), (d)(2)(B).
[4] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 390 (1999). *See also USTA II*, 359 F.3d 554, 562.
[5] *Id.* at 572. *See Triennial Review Order*, 18 FCC Rcd. 16978 (2003).

which are lawful and faithful to the unbundling command of the Act, *and* adopts separate requirements to assure just and reasonable rates, terms and conditions for UNEs that continue to be mandated under Section 271, local exchange competition in the mass market for POTS services will be irreparably destroyed. In short, the dictates of the Telecom Act require that the rules to be adopted in this proceeding include, at a minimum: (1) concrete affirmation of the continuation of ILEC unbundling requirements under Section 271 at demonstrably just, reasonable and nondiscriminatory rates; (2) affirmation of the mandatory requirement of Section 251, applicable to all interconnection arrangements ("voluntary" or otherwise), that interconnection agreements between ILECs and CLECs must be filed in their entirety with State Commissions; (3) additional requirements that are essential prerequisites to any credible Commission finding of "non-impairment," notably including meaningful hot-cut requirements and standards and transitional or "rolling" access to unbundled local switching, which indeed have been suggested or endorsed by the *USTA II* court; and (4) affirmation of the "second six months" transitional plan described in the Order that accompanied the instant *NPRM.*

II. The Commission and the Court Have Held Correctly That Section 271 Independently Requires BOCs to Provide Unbundled Loops, Transport and Switching at Just, Reasonable and Non-Discriminatory Rates. The Commission Must Now Give Meaning to That Requirement

The *Triennial Review Order* explicitly held that Section 271(c)(2)(B) of the Telecommunications Act establishes an "independent and ongoing" obligation "for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under Section 251."[6] The *USTA II* court expressly affirmed this holding,[7] for a very good reason: no other interpretation is possible under the plain language of the Telecom Act. Section

[6] *Triennial Review Order,* 18 FCC Rcd. 16978, 17384.
[7] *USTA II*, 359 F.3d at 588.

271 provides, quite straightforwardly, that BOCs may provide in-region interLATA services only if they offer competitors, among other things,

(a) nondiscriminatory access to unbundled network elements pursuant to the above-described provisions (and limitations) of Section 251(c)(3) (47 U.S.C. §271(c)(2)(B)(ii)) *and*, among other specific items --

(b) access to unbundled local loops (47 U.S.C. §271(c)(2)(B)(iv)), local transport (47 U.S.C. § 271(c)(2)(B)(v)), local switching (47 U.S.C. § 271(c)(2)(B)(vi)), and signaling (47 U.S.C. § 271(c)(2)(B)(x)).

The BOC petitions referenced in the *NPRM* essentially ask the Commission to regard these very specific provisions of Sections 251 and 271 as identical and fungible – thus their prayer that the Commission forbear from enforcing the latter if it "de-lists" any or all "Section 251 UNEs" pursuant to the "impairment" analysis mandated in that section. But, as the Commission correctly held in the *Triennial Review Order*, these obligations are separate and independent. In fact, they are that and much more—they are distinct in each of these critical ways:

(1) Section 251 lists no specific network elements, but rather leaves that task to the Commission, while Section 271(c)(2)(B) *specifically* requires the provision of, *inter alia*, local loops, transport, switching, and signaling;

(2) Section 251(c) requires only the provision of those UNEs that the Commission finds to be mandated under the "necessary" and "impair" standards of that section, while Section 271(c)(2)(B) requires the provision of the aforementioned UNEs *without any such limiting standards*;

(3) The requirements of Section 251(c)(3) and 252(d)(1) are expressly incorporated as checklist items in Section 271(c)(2)(B)(ii) (referred to by the Commission as "checklist item 2"),[8] while unbundled loops, transport, switching, and signaling are listed *separately and independently* as checklist items 4, 5, 6 and 10 (47 U.S.C. § 271(c)(2)(B)(iv), (v), (vi), (x)); and

(4) The access and interconnection provisions of Section 251(c) are "duties" required of all ILECs irrespective of other considerations, while the checklist items in Section 271(c)(2)(B) must be implemented only if a BOC wishes to provide in-region interLATA services in a state.

[8] *See Triennial Review Order* at 17383 and n.1974.

Thus, far from being limited by or redundant of the provisions of Section 251(c), the unbundling obligations of Section 271(c)(2)(B) are utterly distinct in purpose, scope, and applicability. Indeed, it is impossible to fairly conclude that Congress intended them to be interrelated. If Congress so intended, it would have so indicated; but "[t]he short answer is that Congress did not write the statute that way."[9] Instead, by incorporating the Section 251(c)(3) provisions as checklist item 2 and independently including unbundled loops, transport, switching and signaling as items 4, 5, 6 and 10, it indicated precisely the opposite. Section 271 has no nexus whatsoever to the "necessary and impair" analysis upon which Section 251(c) hinges and the *USTA II* decision focused, and the result of such analysis has no bearing on the ongoing requirements of Section 271.

Moreover, although the BOCs have asked the Commission to forbear from enforcing the Section 271 unbundling requirements, the Commission may not do so. In unusually direct and emphatic terms, Congress in the Telecom Act admonished the Commission not to modify or limit the specific requirements of the Section 271 checklist. Section 271(d)(4) of the Act states with blunt clarity:

> LIMITATION ON COMMISSION. – The Commission may not, by rule *or otherwise*, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B).[10]

Thus, Congress made unerringly clear that BOCs must comply with and the Commission must enforce the Section 271(c)(2)(B) checklist "as is," without either extending it or limiting it.

As the Commission's *Triennial Review Order* found and the *USTA II* court affirmed, these Section 271 unbundling requirements are subject to the "just, reasonable and

[9] *Russello v. United States*, 464 U.S. 16, 23 (1983).
[10] 47 U.S.C. § 271(d)(4) (emphasis added).

nondiscriminatory" standard for rates, terms and conditions of Sections 201(b) and 202(a) of the Communications Act.[11] In the *Order* portion of its current proceeding, the Commission has undertaken an interim effort to assure compliance with these standards. But the Commission has an ongoing duty to assure just, reasonable and non-discriminatory rates. In light of the void that will be created upon the expiration of the interim rules and the recent actions and public statements of the ILECs, it is clear that the Commission must continue to assure that these UNEs are provided at just, reasonable and nondiscriminatory rates in the longer term. In short, the Commission must continue and extend the constraints on these ILEC rates beyond the "interim" period; and it must recognize and give due credit to the informed findings of State Commissions in any instance where that State authority has specifically reviewed such rates but this Commission has not.[12]

III. Carriers Are Required to File All of Their "Commercially Negotiated" Agreements Involving Interconnection In Their Entirety With State Commissions

It should be obvious that the non-discrimination requirement described above would be utterly null and unenforceable in the current environment if post-*USTA II* "commercial agreements" for interconnection arrangements between ILECs and CLECs are not exposed to public view. Fortunately for competition, the statute conclusively addresses this problem by unambiguously requiring such public filing of interconnection agreements with state Commissions, irrespective of whether they are the product of voluntary negotiation or arbitration. ILEC arguments to the contrary are fallacious and belied by the plain, clear language of the Act. Accordingly, the Commission's only course is to give recognition to that plain

[11] *See Triennial Review Order* at 17389; *USTA II*, 359 F.3d at 590.
[12] For this reason, the Commission must deny BellSouth's "Emergency Petition for Declaratory Ruling and Preemption of State Action" in WC Docket No. 04-245. *See NPRM* at n.38.

language and to clarify in this proceeding that the new generation of commercial agreements must be filed with the appropriate State Commissions.

The very title and opening words of Section 252 clarify the matter:

> SEC. 252. PROCEDURES FOR NEGOTIATION, ARBITRATION, AND APPROVAL OF AGREEMENTS.
>
> (a) AGREEMENTS ARRIVED AT THROUGH NEGOTIATION -
>
> (1) VOLUNTARY NEGOTIATIONS - Upon receiving a request for *interconnection*, *services*, *or network elements* pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement … shall be submitted to the State commission under subsection (e) of this section. [emphasis added]

Section 252(e), in turn, commands with equal clarity:

> (e) APPROVAL BY STATE COMMISSION –
>
> (1) APPROVAL REQUIRED – Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. . . .
>
> (2) GROUNDS FOR REJECTION – The State commission may only reject –
>
> (A) an agreement (or any portion thereof) adopted by negotiation under subsection (A) if it finds that –
>
> (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement. . . .

The only lawful rationale for removing any such agreement from a state's rightful review under the Act would be that the arrangement is not an interconnection agreement at all—that is, that it is not a "request for, interconnection, services *or* network elements pursuant to Section 251." It clearly is not enough that the parties to a request for interconnection or services *say* it is not such a request, in order to avoid the Act's filing requirement; nor is it tenable that a contract that is exempt from the provisions of subsections (b) and (c) of Section 251 is somehow transformed into a "non-251" contract exempt from Section 252, or that the parties can

unilaterally decide which of a contract's provisions are "non-251," and disclose only those matters that they unilaterally – and in their self-interest– deem to be "251" provisions. Even SBC, which argues that these agreements may be kept secret, acknowledges that "Section 252(a)(1) requires the filing of 'agreements,' not various terms of agreements."[13]

The Commission, in addressing the refusal by a Bell Company to file certain agreements with State commissions under section 252, could not have been clearer: "Based on [the statute], we find that an agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1)."[14] Indeed, the purpose of requiring filing and disclosure of such agreements is not only to subject them to review by the state commissions, but also to provide other carriers with the opportunity to review such agreements for potential adoption and to ensure non-discriminatory treatment as required by Section 202(a) of the Communications Act. No attempt by two parties to avoid these requirements by inclusion of a simple declaration in the body of the contract that the agreement has not been entered pursuant to Sections 251 and 252 can deprive either a state or other carriers of their right to such review. If such were the case, incumbent local carriers would have virtually free rein to negotiate discriminatory agreements. That is a nonsensical proposition, and manifestly not the intent of the Act.

Simply stated, the Telecom Act by its terms does not entrust such critical competitive decisions to the sole discretion of an ILEC (and the CLEC with whom it concludes a possibly

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[13] *See* SBC "Emergency Petition for Declaratory Ruling, Preemption and for Standstill Order to Preserve the Viability of Commercial Negotiations," WC Docket No. 04-172, filed May 3, 2004, at n.16.

[14] In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), *Memorandum Opinion and Order*, 17 FCC Rcd. 19337 at ¶ 6 (2002) ("*Qwest Ruling*") (emphasis in original). *See also* Qwest Corp. Apparent Liability for Forfeiture, *Notice of Apparent Liability for Forfeiture*, 19 FCC Rcd. 5169, ¶ 22 (2004) ("*Qwest NAL*").

discriminatory deal). Section 251's threshold, opening provision – prior to the additions or limitations of following subsections – establishes the baseline requirement that carriers must "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[15] Thus, it cannot be argued credibly that commercially negotiated interconnection agreements are not "pursuant to" Section 251. By definition, all interconnection agreements implicate that section – and the fact that Section 252 instructs that "Agreements Arrived At Through … Voluntary Negotiations" can be promulgated without regard to the standards of two particular subsections of Section 251 means just that: such agreements may disregard those subsections, not the entire section.

The applicable and dispositive law is simple:

(1) Section 251, "Interconnection," by its terms applies to agreements relating to interconnection;

(2) Section 252(a)(1), "Agreements Arrived at Through Negotiation – Voluntary Negotiations," instructs that this kind of agreement may forego the standards of subsections 251(b) and (c), and "shall be submitted to the State commission under subsection (e);" and

(3) Subsection (e) demands that "*Any* interconnection agreement adopted *by negotiation* or arbitration *shall be submitted* for approval to the State Commission." And to anticipate any question as to *why* this should be, subsection (e) goes on to provide that answer: to determine if "an agreement (*or any portion thereof*) *adopted by negotiation* … discriminates against a telecommunications carrier not a party to the agreement…."[16]

Where the plain words of the statute are so utterly clear, parties may not avoid filing these agreements (or "any portion thereof"), and the Commission may not permit such

[15] 47 U.S.C. § 251(a)(1).
[16] 47 U.S.C. §§ 251, 252(a), (e) (emphases added).

avoidance. The above-quoted non-discrimination provisions of Section 252 are *Congressional* policy and are the very bedrock of the Telecommunications Act, and for that matter, of national telecommunications policy since 1934.[17] The Act unambiguously strikes a balance: It explicitly recognizes the virtue and value of voluntary negotiations *and* provides for how they should be treated: they are exempt from the standards of subsections 251(b) and (c), and they are subject to the filing requirement of subsection 252(e). And Congress explains why this must be: to prevent "discriminat[ion] against a telecommunications carrier not a party to the agreement."

As far back as 1996, the Commission has taken the position that:

> Requiring filing of all interconnection agreements best promotes Congress' stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should have the opportunity to review all agreements . . . to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest.[18]

Finally, in the *Qwest Ruling*, the Commission made clear that, pursuant to their statutory role and experience to date, State commissions are in the best position to determine whether a particular agreement is required to be filed as an "interconnection agreement."[19] As such, the Commission found that the States should determine in the first instance which sorts of agreements fall within the scope of the statutory standard.[20]

In sum: Sections 251 and 252 of the Telecom Act still exist. The *USTA II* court interpreted the meaning of the word "impair" in subparagraph 251(d)(2)(B); it did not overturn the statute. The fact that parties may agree to bypass subsections (b) and (c) of Section 251 – as

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[17] The Communications Act of 1934 provides: "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage." 47 U.S.C. § 202(a).

[18] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd. 15499, 15583 (1996).

[19] *See Qwest Ruling*, ¶¶ 7-8.

[20] *Id*. at ¶ 8.

permitted under Section 252(a)(1)'s guidance pertaining to "Agreements Arrive at Through … Voluntary Negotiations" – manifestly does not remove such agreements from Sections 251 and 252 altogether. Section 251's opening clause states flatly the seemingly unexceptionable proposition that an agreement involving interconnection is an interconnection agreement under its terms; and Section 252's opening clause clarifies that it applies to "Voluntary" as well as arbitrated agreements. The Commission's final rules in this proceeding should so declare, and reaffirm the requirement that carriers must file agreements that entail interconnection arrangements with the appropriate State Commission.

IV. The Commission's Final Rules Must Mandate An Efficient and Effective Hot-Cut Process and "Rolling" Access to Unbundled Switching

These Joint Commenters understand that other commenters will address in detail the minimum necessary transitional requirements that the Commission must adopt as a prerequisite to any reasoned finding that competitive carriers are not "impaired" without access to the UNEs that were the focus of the *USTA II* decision. We expect to comment on such proposals in the reply comment phase. It is already utterly clear that such minimum requirements must include the adoption of efficient and effective "hot-cut" standards, as well as access to unbundled local switching on a "rolling" basis in all markets.

It should be self-evident that there can be no transition from ILEC-provided switching to self-provisioned switching or to a wholesale switching configuration unless batch hot-cuts are offered and provided on a seamless, fully automated basis and at commercial volumes, such that the transition will cause no disruption of service to end user customers. Further, the Commission must assure that hot-cuts are provided at just, reasonable and non-discriminatory rates that will not disadvantage CLECs in their ability to compete with ILECs for acquisition and retention of local exchange customers. It would be ironic as well as destructive of local competition if the

Commission were to allow rates for hot-cuts to themselves constitute an impairment to the provision of competitive services.

Similarly, the Commission's final rules in this proceeding must mandate the availability of "rolling" access to unbundled local switching in all markets for a period of at least 90 days, to ensure that competitive providers are not unduly disadvantaged at the starting gate of local customer acquisition either in terms of significantly greater costs or of a greater risk of delay and disruption in provisioning customers. In the *Triennial Review Order*, the Commission recognized the potential benefits of such rolling access, *i.e.*, "by allowing competitive LECs to aggregate customers in preparation for a batch cut over and to avoid certain non-recurring costs associated with end users who might discontinue service during the first few months after becoming customers of the competitive LEC."[21]

Importantly, the *USTA II* decision expressed approval for these measures. The court found that the Commission's provisional nationwide finding of impairment was flawed because it did not adequately justify its concerns regarding the efficacy of the hot-cut process, and it criticized the Commission for not considering narrower alternatives to nationwide unbundling of local circuit switching, specifically citing the "rolling" access option.[22] The Commission can remedy these perceived failings by directly and effectively addressing the issue of hot-cut standards and pricing and by implementing a rolling access scheme.

V. The Commission Should Formally Adopt the "Second Six Months" Phase of Its Transition Plan

Finally, the Commission's *Order and NPRM* is ambiguous as to whether the second six-month phase of its transition plan has been finally adopted. While the Commission states that it

[21] *Triennial Review Order* at 17265.
[22] *USTA II* at 569-71.

is "set[ting] forth transitional measures for the second six months thereafter,"[23] the *Order* portion also states that the Commission "contemplates" the second six-month phase, and that it "propose[s]" that part of the overall plan.[24] The Commission has fully and compellingly articulated the need for both phases of the transition plan. To the extent that any question remains as to the finality of the Commission's determination to adopt the second six-month phase of the plan, it should affirm its intention in its upcoming *Report and Order* in this proceeding.

Respectfully submitted,

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[23] *Order and NPRM* at ¶ 1. *See also id.* at ¶¶ 10, 17.
[24] *Id.* at ¶ 29.